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VIA EMAIL ONLY

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Environmental Quality Board
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Re: Possible Amendments to Rules Governing Environmental Review of Large Electric Power Generating Plants and High Voltage Transmission Lines, *Minnesota Rules*, Part 4410.7000 to 4410.7500 and Parts 4410.4300, subparts 3 and 6 and 4410.4400, subparts 3 and 6.

Dr. Mr. Mitchell:

The Minnesota Transmission Owners[1] expresses its appreciation to the Environmental Quality Board Staff for the manner in which it has conducted this rulemaking. It has been an open, deliberative, and well paced process where all interested parties have had the opportunity to be involved. The MTO remains supportive of the proposed rules. Because the new rules clarify at the outset that the EQB is the responsible governmental unit for purposes of environmental review, they are likely to minimize unnecessary delay in certificate of need ("CON") proceedings and, as stated in the Statement of Need and Reasonableness ("SONAR"), shorten the period between the time a project is proposed and when a route is actually permitted. We are also encouraged that one of the main purposes of the proposed rules' environmental report provisions is to, over time, make environmental review more generic from one project to the other, thereby eliminating unnecessary duplication and streamlining the amount of work for everyone involved. The proposed rules represent an improvement to the CON process.

[1] The Minnesota Transmission Owners consists of the following electric utilities: Dairyland Power Cooperative, Great River Energy, Hutchinson Municipal Utilities, Interstate Power Company, Minnesota Power, Minnkota Power Cooperative, Missouri River Energy Services, Otter Tail Power Company, Southern Minnesota Municipal Power Agency, Willmar Municipal Utilities, and Northern States Power Company, d/b/a Xcel Energy. Collectively, these utilities own and operate more than six thousand five hundred miles of transmission lines in the state, representing an investment of more than three-quarters of a billion dollars.

While the MTO supports adoption of the new rules, we remain concerned regarding a few, important provisions. These concerns are not new to EQB Staff. And while EQB Staff has been disinclined thus far to adopt the MTO's specific recommendations regarding these provisions, we are hopeful the full Board will accept these proposals in the spirit they are given – as improvements to, not substantial modifications of, the proposed rules.

1. 4410.7010 – Applicability and Scope.

Subpart 2. Scope. This important provision sets out the scope of the proposed rules. In an earlier version of the draft rules, EQB Staff deleted the following sentence from this section: "No other environmental review shall be required at the need stage for high voltage transmission lines and large electric power generating plants." For the reasons that follow, we urge the Board to reinsert the provision into the final rule.

When the draft rules were first proposed, Public Utility Commission ("PUC" or "Commission") Staff expressed some concern that the sentence could be interpreted as limiting the Commission's ability to require applicants to provide additional environmental information during the CON proceeding. At the June 5, 2003 meeting held to discuss the rules, this provision was discussed at length. As that discussion made clear, the intent of the sentence was not to limit the Commission's ability to seek additional information if it believed more information was necessary to complete the record.

As also became evident at the June 5 meeting, deleting the sentence is only likely to lead to more, not less confusion. This is because deleting the phrase "no other environmental review shall be required . . . " makes the rules silent on this point, and thus begs the question whether additional environmental review is in fact permissible? The Sierra Club's argued this very point at the June 5 meeting. The Sierra Club argued that the environmental was not the environmental review document that the Commission may consider in certificate of need proceedings.

At the June 5 meeting, the Sierra Club made sweeping, convoluted arguments that additional environmental review at the certificate of need stage is in fact permitted, or at least not prohibited by these proposed rules. Its argument, as best as we understood it, was that the during the certificate of need proceeding, parties could in fact introduce environmental evidence that had not been addressed in the EQB's environmental report. Our understanding of one of the main reasons the rules sought to centralize the review of environmental issues with the preparation of an environmental report by EQB was to bring to order, under the confines of one document, the scope of what environmental information would be, or would not be, relevant to the Commission's analysis in CON proceedings. Unless the rule specifically states that the environmental review is the only environmental review document that will be prepared by the EQB and considered by the Commission in CON proceedings, parties will undoubtedly be tempted to raise extraneous, irrelevant issues – issues that were specifically excluded for consideration by the EQB in conducting its environmental report. This is counterproductive and inconsistent with the intent of centralizing the environmental information in one report.

Our request is simple and straightforward: if the EQB's intent is that the environmental report is supposed to be the only environmental review document that will be required at the certificate of need stage – which we submit is what EQB Staff has indicated has been the intent all along – the rules should eliminate any ambiguity by stating that intent.

It is interesting to note that EQB Staff originally deleted the language based on concern from the Public Utilities Commission Staff that the sentence may be construed to prevent the Commission from requiring applicants to file certain environmental information. To clarify that this was not the language's intent, Commission Staff recommended in its December 4, 2002 comments that the sentence simply be modified as follows:

> No other environmental review shall be required at the need stage for high voltage transmission lines and large electric power generating plants except as may be determined to be necessary by the PUC in carrying out its statutory responsibilities.

Comments of Burl Haar, Executive Secretary, Public Utilities Commission, December 4, 2003, at p. 1.

The MTO supports the modification as recommended by PUC Staff. Given that EQB Staff pulled the sentence in the first place in deference to PUC Staff's concern, it remains unclear why EQB Staff believes the sentence should be deleted in its entirety, rather than simply modified as suggested by the PUC Staff? We respectfully request that the sentence be reinserted into the proposed rule, as modified consistent with PUC Staff's December 4, 2002 recommendation.

2. 4410.7015 – Definitions.

Subp. 2. Associated Facilities. We agree with the new definition but believe it would be more helpful if the phrase "as used in part 7035, subparts 1 and 2" were inserted immediately before "means buildings . . . "

3. 4410.7030 – Process for Preparation of an Environmental Report.

Subpart 3. Public Meeting. The last sentence provides that the public meeting must be held in location that is "convenient" for persons who live near the project. Since "convenient" is highly subjective, Staff should consider re-phrasing this sentence.

4. 4410.7035 – Content of Environmental Report.

Subpart 1. Content of Environmental Report.

Item B – sub item B requires that the environmental report must include a general description of alternatives to the proposed project. The language needs to more carefully distinguish between electric generating facilities and transmission lines. Where the project is an HVTL, there should be no requirement on the part of the applicant – and no need for the report to address – alternative *energy sources.* Under federal law, transmission providers are required to provide open and non-discriminatory access and, in effect, be blind as to the source of energy traveling over its wires. Equally important, federal law provides that transmission providers be functionally separate from generation utilities. This means that transmission providers have no meaningful way of influencing what particular energy source is injected into the grid. As a result, requiring owners and operators of transmission to demonstrate alternative energy sources in support of their application is irrelevant as to whether the transmission facilities are needed.

To correct this problem, we suggest the following clarification to 4410.7035, subpart 1(B):

> B. a general description of the alternatives to the proposed project that are addressed. Alternatives shall include the no-build alternative, demand side management, purchased power, facilities of a different size or**, where an LEPGP is proposed,** using a different energy source than the source proposed by the applicant, generation rather than transmission if a high voltage transmission line is proposed, transmission rather than generation if a large electric power generating plant is proposed, use of renewable energy sources **if an LEPGP is proposed**, and those alternatives identified by the chair.

Subpart 4. Incorporation of information. Staff proposes to incorporate information and data into the environmental report "in accordance with the provisions of 4410.2400." Rule 4410.2400 provides in part that an "RGU shall incorporate material into an EIS by reference when the effect will be to reduce bulk without impeding governmental and public review of the project." Because an environmental report is not an EIS, we recommend that subpart be re-written in a manner that captures the spirit of 4410.2400 but does not include any reference to an EIS. This is simply a matter of sound drafting.

5. 4410.7050 - Environmental Report to Accompany Project.

Subpart 1. PUC Decision. Staff has accepted the language proposed by PUC staff on December 4, 2002. The MTO does not object to this proposed change. While it makes sense that the PUC not be able to issue a final decision until after considering the environmental report, it seems odd that the PUC would want to be prevented in all instances from even "commencing" a public hearing before the environmental report is finalized. It's at least plausible that

circumstances would warrant the PUC *at least beginning* the hearing process, possibly conducting testimony and other evidentiary proceedings, etc. with the environmental report becoming part of the hearing record later on. Given the fixed six-month timeframe in which the PUC is required to issue a decision (7 months under § 216B.2425 proceedings), the rule should allow the PUC to commence proceedings if it, and the ALJ assigned to hear the case, believe it necessary or desirable.

6. 4410.7055 – Review by Other Governmental Bodies. This rule mandates that state and local agencies with permitting authority over a particular project consider the EQB's environmental report before it makes a permitting decision. Because the rule is unnecessarily restrictive on local permitting authorities, it should be modified to more appropriately recognize local governments' independent permitting authority.

We do not object to the fact that other agencies and governmental bodies should consider the EQB's environmental report in making their permitting decision on a particular energy facility. The objection rather is that the rules *mandate* that review in legally binding rules. Requiring as a legal matter that agencies and local governments "consider" the environmental report before making a permitting decision by necessity calls into question the *quality* of that consideration. Such drafting merely provides project opponents the ability to tie up needed projects in arguments that the local government didn't adequately "consider" the environmental report.

In our December 6, 2002 and February 20, 2003 comments we proposed language that would accomplish what we believe is the intent of this provision – to ensure that local governments and other state agencies have as much information as possible when permitting a particular project – but without setting up the possibility for unproductive and unintended delays. That recommendation would change the rule as follows:

"The environmental report shall be made available to ~~A~~a~~a~~ll local and state governmental bodies that were identified in the environmental report with permitting authority over the project for their consideration ~~shall consider the report~~ in making any decision to authorize the project."

We agree that local and other state authorities should consider the EQB's environmental report in their own permitting decisions. After all, a lot of effort and resources will have went into making the report something that should be relied on by any permitting authority. We believe that our suggestion, however, accomplishes the intended goal without the potential for adverse consequences. We respectfully request that our recommendation be accepted.

7. 4410.7060 – Joint Proceeding.

Subpart 1. Environmental Assessment. The MTO generally supports the concept that where an applicant files a CON (or certification under § 216B.2425) at the same time as it files for route/site review under chapter 4400 there should be only one form of environmental review. What needs to be clarified, however, is how staff sees the rule working when the applicant doesn't necessarily file both applications "at the same time?" The proposed rule language only provides that one environmental review is necessary where a CON/certification applicant has "also applied to the EQB for a site or route permit . . . ." The language doesn't provide enough temporal clarity. For instance, what happens if an applicant files the route permit application two weeks after it filed the CON application? One month? Two months? etc. We respectfully request that EQB Staff clarify this particular provision.

8. 4410.7065 – Alternative Form of Review. It is unclear why EQB Staff is proposing to delete language in this section that previously had stated that the environmental report "is the only state environmental review document required to be prepared on an LEPGP or HVTL at the time the decision regarding need is sought from the [PUC]?" Consistent with our recommendation concerning part 4410.7010, subpart 2, we believe this particular language added a great deal of clarity on the question of what environmental review is required and not required in CON proceedings. We respectfully request that the language be reinserted.

Thank you for the opportunity to provide comment on and participate in this important rulemaking. We look forward to further discussing these matters when the rulemaking is taken up by the full Board. Should you have any questions, please do not hesitate to contact me at the above number.

Very truly yours,

LINDQUIST & VENNUM P.L.L.P.

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